RECORD AND BRIEFS

Nos. 11-338 and 11-347

IN THE

Supreme Court of the United States

DOUG DECKER, in his official capacity as Oregon State Forester, et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

GEORGIA-PACIFIC WEST, INC., et al.,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether 33 U.S.C. § 1369(b) of the Clean Water Act, which precludes plaintiffs in citizen suits from challenging certain kinds of agency action, applies in this case and thus limits the interpretive pathways available to this Court.

2. Whether a permit under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) is required for pipes, ditches, and channels that collect polluted stormwater from active-hauling logging roads and discharge it into navigable waters.

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BRIEF FOR RESPONDENT

INTRODUCTION

This case presents an issue of first impression: whether the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permit requirement applies to pipes, ditches, and channels that collect polluted stormwater from active-hauling logging roads and discharge it into navigable waters. Prior to this litigation, no federal appellate court had ever considered the question and, as the United States acknowledges, the Environmental Protection Agency had never taken a clear position on the subject.

Nevertheless, claiming to have assumed for years that the Act did not apply to them, petitioners and their amici urge this Court, on numerous policy grounds, to exempt these discharges from the NPDES program. But the simple reality is that these parties are making their arguments in the wrong forum. This is a court of *law*. And the law that governs this case – the statutory provisions of the Act and, to the extent relevant, their implementing regulations – leaves not the slightest uncertainty that these discharges are subject to the NPDES permit requirement. What is more, there is good reason for this reality. This Court should affirm the judgment of the court of appeals.

STATEMENT OF THE CASE

A. Basic Precepts Of The CWA

Prior to 1972, federal law attempted to abate water pollution by "employ[ing] ambient water quality standards specifying the acceptable levels of pollution" in navigable waters. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). This system of regulation, however, "proved ineffective." *Id.* "The problems stemmed from the character of the standards themselves, which focused on the tolerable effects rather than the preventable causes of water pollution, from the awkwardly shared federal and state responsibility for promulgating such standards, and from the cumbrous enforcement procedures." *Id.* (footnote omitted).

In 1972, declaring that "'the Federal water pollution control program . . . has been inadequate in every vital aspect,'" Congress enacted amendments to federal law that became known as the Clean Water Act (CWA or "the Act"). *Id.* (omission in original) (quoting S. Rep. No. 92-414, at 7 (1971)). Foremost among the Act's innovations is the NPDES permit program. Under this program, every owner or operator of a "point source" of pollution – save exceptions irrelevant here – must obtain and comply with a permit authorizing the discharges. *Id.*; *see also* 33 U.S.C. §§ 1311(a), 1342(a).

The CWA defines the term "point source" in specific terms. A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Act carves

out one exception to this definition for certain "agricultural" discharges. *Id.* But while other industries, including the logging industry, have sought exclusion from the NPDES program, Congress has never seen fit to grant additional exemptions.[1] Accordingly, when the Environmental Protection Agency (EPA) has attempted on its own to exempt certain activities from the program, courts consistently have rejected those regulations as inconsistent with the CWA's statutory scheme. *See, e.g., Nat'l Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009) (regulation exempting pesticide residue); *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008) (regulation exempting discharges from vessels).

In amendments to this regime enacted in 1987, Congress dealt specifically with point-source discharges of stormwater. *See* 33 U.S.C. § 1342(p). These amendments give EPA discretion over whether to require NPDES permits for channeled stormwater from "relatively de minimus sources" – things such as rain gutters and similar devices at "churches, schools and residential properties." Pet. App. 37a.[2] But the amendments continue to insist that stormwater

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[1] The logging industry has unsuccessfully sought exemptions from the NPDES program on at least three occasions. *See* S. 1269 & H.R. 1749, 109th Cong. (1st Sess. 2005) ("The Administrator shall not require a permit under this section . . . for . . . silvicultural activities."); H.R. 3609 & H.R. 3625, 106th Cong. (2d Sess. 2000) (virtually the same language); *infra* at 37-38 (describing legislative effort in 1977).

[2] All citations to the Pet. App. are to the appendix to the petition in No. 11-347.

discharges "associated with industrial activity" require NPDES permits. 33 U.S.C. § 1342(p)(3)(A).

B. The CWA's Application To Logging Operations

This case does not involve mere "forest roads," all logging roads, or even all discharges from logging roads. Instead, this case concerns the relatively small subset of logging roads that facilitate active timber cutting and hauling, and that use man-made pipes, ditches, and channels to collect polluted stormwater and discharge it into navigable waters. It is important, therefore, first to describe timber harvesting operations and their use of logging roads, and then the history of EPA's regulations relating to discharges of pollutants from such operations.

1. *Logging operations and logging roads*

a. The logging business has come a long way since the brawny lumberjacks of yesteryear. Whereas logging in the nineteenth and early twentieth centuries was a fairly manual and ad hoc enterprise, states and private companies now actively manage large swaths of forest for industrial timber harvesting.

When a decision is made to harvest a tract of timber, the logging company brings in an assortment of heavy machinery. Mechanical harvesters and "feller bunchers" – some weighing up to twenty tons – fell the trees. These machines sometimes use continuous (or caterpillar) tracks to maneuver over bumpy and steep terrain. They have giant steel arms with spinning blades and claws at the end, so that in a matter of seconds they can saw trees off at their stumps, grab them, and set them aside. Skidders

and forwarders then arrive to drag the felled trees and to position them in loading areas. Another machine strips the limbs from the trees. Then log loaders lift logs onto massive trucks for hauling them to sawmills or other locations for processing. In short, "[w]hile most people are familiar with the iconic large handsaws of yore, hand axes, or even chainsaws, . . . [the] goal of modern harvesters is summed up in the phrase: no feet on the forest floor."[3] Massive equipment, with humans safely ensconced in climate-controlled environments, handles everything from cutting to hauling.[4]

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[3] WiseGeek, *What Equipment Is Used in Timber Harvesting?*, http://www.wisegeek.com/what-equipment-is-used-in-timber-harvesting.htm (last visited Oct. 12, 2012).

[4] A complete catalogue of logging machinery and equipment is available on the website of the Forestry Department at Virginia Tech University. *See Timber Harvesting (Logging) Machines and Systems*, Va. Tech Dep't of Forestry (Sept. 2007), http://tinyurl.com/NEDC1. For a video of a feller buncher at work, see Woodharvesting, *Feller Buncher Tigercat L870C on Steep Terrain*, YouTube (Mar. 27, 2011), http://tinyurl.com/NEDC1-1. For examples of typical log loaders doing their jobs, see Tigercat Forestry, *Tigercat 880 Logger*, YouTube (Oct. 26, 2011), http://tinyurl.com/NEDC1-5; Dasani110, *Hauling Logs, Peterbilt 378 550 3406E CAT*, YouTube (Sept. 28, 2007), http://tinyurl.com/NEDC1-9. For photos of various kinds of logging trucks, see *Logging Truck Stock Photos and Images*, Fotosearch, http://www.fotosearch.com/photos-images/logging-truck.html (last visited Oct. 12, 2012). Of course, these videos and photos are not part of the record in this case. But because the district court granted petitioners' motions to dismiss without taking any evidence, respondent references this publicly available information to give this Court a sense of what it must assume respondent would be able to prove in this case.

b. Logging roads are integral to this operation. These roads provide the only access to harvesting sites, allowing the machinery used in this process to get where it needs to be. And once the logs are loaded onto trucks, the roads provide the only pathways for trucks to transport logs (that is, the raw material) out of the forest.

Because of their importance, as well as their fragility in hostile environments, logging roads are carefully engineered facilities. After a trail is cleared and graded, tons upon tons of crushed rock are brought in from a quarry. Because only certain kinds of rock are suitable for creating road surfaces, the rock is often not native to the immediate environment where it is deposited. Road building equipment then aligns and levels the rock to create the road surface. Over time, the heavy logging trucks and other machinery that pass over these roads pulverize the gravel, creating a road surface littered with finely ground, loose matter. Pet. App. 4a.[5]

Logging roads, of course, also have to account for rainwater – particularly the heavy and persistent rains that fall during storm season in the coastal rain forests of the Pacific Northwest. Accordingly, logging roads are either "outsloped," to allow stormwater to wash away downhill, or they are crowned to ensure that stormwater drains off to their sides. 2JA 99.

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[5] For videos capturing this phenomenon, see Chipensaw, *Steep Grade Haul Road*, YouTube (Aug. 23, 2011), http://tinyurl.com/NEDC2-4; 104bigTruck, *Beautiful Kenworth Logging Truck Pulled Around 4 Switchbacks*, YouTube (July 8, 2009), http://tinyurl.com/NEDC2-8.

When logging roads are crowned, they require man-made pipes, ditches, and channels to function properly. *See* 2JA 83. Road engineers strategically place and interlock these drainage mechanisms to collect and divert as much stormwater as possible away from the road surface. Ditches running alongside roads collect the water; culverts (*i.e.*, pipes running underneath the roads) and other channels route the water downhill; and then these man-made conveyances discharge the stormwater.

At least in the areas at issue here, more than 50% – and perhaps as much as 75% – of crowned logging-road stormwater channeling systems discharge the stormwater they collect onto the forest floor, where it can percolate into the ground and leave suspended sediments behind. 2JA 15. Indeed, the Oregon Department of Forestry has published manuals and technical papers identifying the forest floor as the proper place to deliver logging road stormwater. C.A. ER 54 at 107.

But some conveyance systems discharge stormwater directly into rivers and other navigable waters. It is those particular kinds of discharges that are at issue here.

c. When stormwater collects in ditches and channels alongside logging roads, it picks up chemical residue from the vehicles that have traveled over them, debris from log cutting and processing, and – most of all – pulverized rock and sand from the ground-up road surface. Pet. App. 4a. All of these things are classified as "pollutants" under the CWA. 33 U.S.C. § 1362(6). When washed through drainage systems and conveyed by pipes and ditches into navigable water, this polluted stormwater "deposits

large amounts of sediment into streams and rivers." Pet. App. 4a; *see also* 2JA 27-29.

This sediment has numerous deleterious effects. *See generally* Amicus Br. of W. Div. of Am. Fisheries Soc'y. For one thing, it "adversely affects fish – in particular, salmon and trout – by smothering eggs, reducing oxygen levels, interfering with feeding, and burying insects that provide food." Pet. App. 4a. More fundamentally, the accumulation of fine sediment alters the clarity and – when it settles in streambeds – the flow of rivers. 2JA 17. It also decreases water depth, causing water temperature to increase. 2JA 29.

2. *Regulatory history*

a. Shortly after the CWA became law, EPA adopted a regulation exempting all pollution from "silvicultural" (that is, logging) operations from the NPDES permit program. 40 C.F.R. § 125.4 (1975). EPA acknowledged that many discharges from such operations "fall within the definition of point source." *NRDC v. Train*, 396 F. Supp. 1393, 1395 (D.D.C. 1975). But it contended in litigation challenging its rule that such discharges were "ill-suited for inclusion in [the NPDES] permit program," *id.*, because they typically occur as a result of "rainfall runoff," which EPA asserted is difficult to regulate even when it "flows into ditches or is collected in pipes before discharging into streams," 40 Fed. Reg. 56,932 (Dec. 5, 1975).

A district court invalidated EPA's regulation, and the D.C. Circuit affirmed. *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The D.C. Circuit held that "legislators did not intend" to give EPA "broad discretion to exempt large classes of point sources"

from the CWA. *Id.* at 1375. And because the CWA "relie[s] on explicit mandates to a degree uncommon in legislation of this type," "[c]ourts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute." *Id.* at 1375, 1377.

b. While the *Costle* case was working its way through the courts, EPA promulgated a regulation known as the Silvicultural Rule. The rule coined a new term, "silvicultural point source," and defined that term as "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters." 40 C.F.R. § 124.85 (1976). The regulation added that the term "[s]ilvicultural point source" "does not include *nonpoint* source activities inherent to silviculture such as . . . harvesting operations, surface drainage, and road construction and maintenance from which runoff results from precipitation events." *Id.* (emphasis added).

After the D.C. Circuit confirmed in 1977 that the original 1973 regulation conflicted with the CWA's definition of "point source," EPA amended the Silvicultural Rule. In particular, EPA modified the Rule's culminating phrase to make clear that it excluded from its definition of "[s]ilvicultural point source" only "natural runoff" from "nonpoint source" activities. 40 C.F.R. § 122.27. That is how the Rule still reads.

c. After Congress's enactment of the 1987 Stormwater Amendments to the CWA – which, as

noted above, reinforced the permitting requirement for discharges of stormwater "associated with industrial activity," 33 U.S.C. § 1342(p)(2)(B), (3)(A) – EPA promulgated so-called "Phase I regulations" to implement Congress's specific directive.

The Phase I regulations (save exceptions not relevant here) provide that "[f]acilities classified as Standard Industrial Classification[] [SIC] 24" "are considered to be engaging in 'industrial activity.'" 40 C.F.R. § 122.26(b)(14)(ii). Included within SIC 24 is SIC 2411 ("logging") which, in turn, includes "[e]stablishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials." 2JA 53 (quoting "Industry number 2411").

C. Procedural History

1. Respondent Northwest Environmental Defense Center commenced this enforcement action in 2006. Invoking the CWA's "citizen suit" provision, 33 U.S.C. § 1365(a), it sued various Oregon officials (collectively, "the State") and certain private logging companies ("Industry Petitioners"), for violating 33 U.S.C. §§ 1311(a) and 1342 – as well as the Act's implementing regulations – by discharging pollutants into navigable waters without a permit.

In particular, respondent's complaint alleges – and because this case reaches this Court on petitioners' motion to dismiss, all of these allegations must be taken as true – that the Industry Petitioners have purchased the right to harvest timber from tracts in the Tillamook State Forest. The contracts memorializing those sales require the Industry Petitioners to use particular logging roads to access

and haul this timber. 2JA 7-8, 19-20; C.A. ER 47 at 98-99. The contracts also require the Industry Petitioners to maintain these roads, as well as their water collection and drainage systems. 2JA 7-8.

Those roads are named Trask River Road and Sam Downs Road. The section of the Trask River Road at issue runs roughly parallel to the South Fork Trask River. The section of the Sam Downs Road at issue runs roughly parallel to the Little South Fork of the Kilchis River. Both rivers are tributaries of Tillamook Bay and support runs of threatened coastal coho salmon, which are protected under the Endangered Species Act in part because of impacts from sediment pollution. Both rivers are also home to several fish species that the State lists as "species of concern" – coastal cutthroat trout, chum salmon, and Pacific and river lamprey. 2JA 17.

Because these two logging roads are situated in a temperate rain forest and are carved out of sometimes steeply sloped terrain, the roads are equipped with carefully engineered water collection and drainage systems. In the few miles of each road at issue here, the roads use integrated networks of pipes, ditches, and channels to collect and convey stormwater directly into the rivers alongside which they run. 2JA 2, 15, 17-18.

In 2006, the Industry Petitioners were actively engaged in timber cutting, loading, and hauling on and along Trask River and Sam Downs Roads. 2JA 1-25. On numerous days during this period, the roads' pipes, ditches, and channels discharged polluted stormwater into the adjacent rivers and streams. 2JA 22-23. A video that respondent's

counsel took while investigating this case shows this process in action. It shows stained, chocolate-brown colored runoff (stormwater that has picked up sand, dirt, and other debris) being collected, channeled, and discharged directly into a clear, blue-green river. *See* http://tinyurl.com/NEDC5-1.[6] These discharges generated extremely high levels of sediment pollution, resulting in turbidity readings up to 971 times background levels. 2JA 33, 35.[7]

2. Shortly after respondent filed its complaint, petitioners moved to dismiss under Rule 12(b)(6). While those motions were pending, the United States filed an amicus brief announcing "for the first time" that EPA interpreted its regulations to render *all* discharges of polluted stormwater from logging roads exempt from NPDES permitting requirements. Pet. App. 7a, 9a; *see also id.* 109a-114a; U.S. Br. at Cert. 10. Relying solely on the Silvicultural Rule, the district court dismissed the complaint, holding that petitioners' "road/ditch/culvert system" is not a point source of pollution. Pet. App. 57a-64a.

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[6] As with the videos cited above, this video is not part of the record in this case because the case arrives here on a motion to dismiss. Respondent references this information, therefore, to show this Court in a visual way what it plans to prove on remand.

[7] A turbidity reading measures the extent to which sediment or other suspended solids are causing water to become cloudier than normal. Oregon water quality standards typically prohibit more than a 10% increase in turbidity. Or. Admin. R. 340-041-0036.

3. The court of appeals reversed. Applying the plain text of the CWA's definition of "point source," the Ninth Circuit explained that stormwater from logging roads is a point source when, as here, it "is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances." Pet. App. 11a.

The court of appeals next held that neither EPA's Silvicultural Rule nor its Phase I regulations implementing the 1987 Stormwater Amendments exempt the discharges at issue here from the NPDES permit requirement. Turning first to the Silvicultural Rule, the Ninth Circuit explained that the Silvicultural Rule's reference to "natural runoff" from nonpoint source silvicultural activities is susceptible to "two possible readings." Pet. App. 32a. Under the first reading (the one advanced by EPA), stormwater that runs off logging roads can never discharge from a point source. Under a second reading, such stormwater is generally not a point source, but it becomes one (because it is no longer the product of a "natural" process) when it is collected by man-made pipes, ditches, and channels and discharged into navigable waters. Because only the latter reading would "allow [it] to construe the Rule to be consistent with the statute," the court concluded it was required to adopt that interpretation. *Id.* 32a-33a.

As for the Phase I regulations, the Ninth Circuit determined that they plainly require permits for the discharges at issue. Pet. App. 38a-42a. Those regulations, the Ninth Circuit explained, "provide[] that facilities classified as SIC 24 are among 'those considered to be engaging in industrial activity.'" *Id.*

39a (quoting 40 C.F.R. § 122.26(b)(14)(ii)). SIC 24, as noted above, covers "logging," including "cutting timber and producing . . . primary forest or wood raw materials." 2JA 64.

4. After petitioners sought rehearing, the court of appeals sought supplemental briefing on whether 33 U.S.C. § 1369(b) of the CWA has any impact on this case. Specifically, the Ninth Circuit asked whether that provision, which requires challenges to EPA actions "issuing or denying any [NPDES] permit" to be brought directly in the court of appeals within 120 days, 33 U.S.C. § 1369(b)(1), precludes respondent's lawsuit or limits a court's analytical options in resolving it. Pet. App. 5a. The United States maintained that Section 1369(b) poses no problem because the court of appeals did not invalidate any regulation. At most, the Government stated, the Ninth Circuit held that certain ambiguous regulations must be construed in a manner consistent with the statute. *Id.* 7a. The Ninth Circuit "agree[d]" with that submission and adhered to its judgment. *Id.* 6a-7a.

5. This Court granted certiorari. 132 S. Ct. ___ (2012).

SUMMARY OF ARGUMENT

The court of appeals correctly held that the Act's NPDES permit requirement applies to pipes, ditches, and channels that collect polluted stormwater from the active-hauling logging roads at issue here and discharge it into navigable waters.

I. Section 1369(b) does not interfere with subject matter jurisdiction here or even restrict the

interpretive pathways available for resolving respondent's claim. That provision precludes bringing a citizen suit *challenging* certain EPA actions. Respondent, however, is not challenging any EPA action. Instead, it seeks to *enforce* EPA's pertinent regulations, which require – or at the very least are ambiguous and must be construed to require – permits for the discharges at issue.

Even if respondent's statutory arguments implied that certain regulations were invalid for being inconsistent with the Act, it would not matter. Section 1369(b) applies only (as is relevant here) to agency action "issuing or denying any permit" under the NPDES program. Regulations exempting discharges from the NPDES program do neither of these things. Accordingly, this Court need not fret about Section 1369(b). This Court may – indeed, must – use ordinary principles of statutory interpretation to resolve respondent's substantive claim.

II. When active-hauling logging roads use pipes, ditches, and channels to collect polluted stormwater and discharge it into navigable waters, the Clean Water Act – and, to the extent relevant, its implementing regulations – require NPDES permits for such discharges. The Act generally requires permits for all discharges from "point sources," a term that includes "any pipe, ditch, [or] channel" that discharges pollutants into navigable waters. 33 U.S.C. § 1362(14). Those are precisely the types of conveyances at issue here. And nothing in EPA's "Silvicultural Rule" undercuts this analysis. That Rule says simply that "non-point source" "natural runoff" is not a "silvicultural point source." 40 C.F.R.

§ 122.27(b). This case does not involve "non-point sources" or "natural runoff"; instead, it concerns stormwater that is collected and channeled by man-made conveyances.

Nor do the Act's 1987 Stormwater Amendments exempt the discharges at issue from the NPDES program. To the contrary, those amendments mandate that point source discharges of stormwater "associated with industrial activity" require NPDES permits. 33 U.S.C. § 1342(p)(3)(A). Logging roads are "associated with" logging operations, and petitioners' highly mechanized tree harvesting and hauling activities are plainly "industrial" in nature. If any ambiguity existed on that score, EPA's regulations would erase it. Those regulations provide that "[f]acilities classified as Standard Industrial Classification[] [SIC] 24" are industrial, 40 C.F.R. § 122.26(b)(14)(ii), and SIC 24 includes "logging" establishments, 2JA 64.

III. None of petitioners' or the United States' policy or reliance arguments trump the plain meaning of the CWA. Nor are they even persuasive on their own terms. The accumulation of fine sediment from logging roads in our nation's navigable waters presents an acute environmental problem. While the Act affords EPA considerable flexibility in fashioning permit requirements and timetables, it does not allow the agency to ignore the problem entirely.

ARGUMENT

It should tell this Court that something is amiss when both groups of petitioners begin their legal arguments by discussing *regulations* instead of *statutory provisions*. *See* Industry Br. 19; State Br. 20-31. And it should tell this Court even more when the Solicitor General, supporting petitioners, files a brief arguing that this Court lacks the power even to consult or apply the pertinent statutory provisions.

Indeed, something is amiss. Rarely is statutory text so plainly dispositive of a case that makes it all the way to this Court. Accordingly, respondent first debunks the notion that 33 U.S.C. § 1369(b) somehow precludes this Court from consulting the Act's text. Then, applying the familiar two-step framework enunciated in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), respondent shows that when stormwater from active-hauling logging roads is channeled into man-made pipes, ditches, and channels, the plain text of the CWA – and, to the extent relevant, applicable regulations – require parties to obtain permits before discharging that stormwater into navigable waters.

I. Section 1369(b) Does Not Restrict The Interpretive Pathways Available To This Court.

The CWA "clearly confers jurisdiction over this citizen suit" for discharging polluted industrial stormwater without a permit. U.S. Br. 17; *see* 33 U.S.C. § 1365(a), (f). Petitioners and the United States argue, however, that Section 1369(b) – which requires certain kinds of EPA action to be challenged directly in the courts of appeals, generally within 120

days – restricts "the range of arguments" that this Court may consider in assessing respondent's substantive claim. U.S. Br. 17.

Not so. Section 1369(b) does not apply here because respondent is seeking to enforce, not to challenge, the CWA and pertinent regulations. And even if – as petitioners contend – respondent's statutory arguments implied that certain regulations were invalid, Section 1369(b) still would not bar this action because that provision does not apply to regulations that exempt discharges from the NPDES system.

A. Section 1369(b) Does Not Apply Because Respondent Is Seeking To Enforce, Not To Challenge, The CWA And Pertinent Regulations.

Section 1369(b)(2) precludes plaintiffs in a citizen suit from challenging certain kinds of agency action. It poses no obstacle, however, when plaintiffs seek to "enforce" regulations. 33 U.S.C. § 1365(a). Accordingly, neither petitioners nor the United States dispute – nor could they – that Section 1369(b) is irrelevant insofar as one of two possible scenarios is present here: (1) EPA's interpretation of its regulations is plainly inconsistent with the text of the regulations, *see Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012); or (2) the regulations are ambiguous but better read to require petitioners to seek permits, and EPA's contrary view is not entitled to deference, *see id.*; *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). In either case, simply

enforcing the pertinent regulations is all that is necessary to give respondent relief.

Section 1369(b) also is irrelevant in a third scenario – namely, if the regulations are ambiguous and must be construed contrary to EPA's view in order to prevent a conflict with the CWA itself. As this Court explained in *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007), when a court adopts "a purposeful but permissible reading of the regulation . . . to bring it into harmony with [its] view of the statute," the court does not run afoul of statutes such as Section 1369(b) because such judicial action is not "a determination that the regulation as written is invalid." *Id.* at 573; *see also id.* at 581; Industry Br. 52-55. To the contrary, such judicial action saves a regulation from invalidity and enables its enforcement.

In an about-face from its position in the court of appeals and at the certiorari stage, the United States disagrees on this third point. The Government now argues that Section 1369(b) precludes this Court from rejecting EPA's interpretation of ambiguous regulations "based on [this Court's] view that a different construction is necessary to prevent a conflict with the governing statute." U.S. Br. 21-22; *compare* Pet. App. 6a-7a; U.S. Br. at Cert. 9-10. In support of this new argument, the United States relies upon a single sixty-seven-year-old case that it has never previously mentioned in this litigation: *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

Seminole Rock cannot bear the weight the Government places upon it. It is well established, as

a general rule, that this Court may not defer to an agency's interpretation of an ambiguous regulation if the interpretation "violate[s] the Constitution *or a federal statute.*" *Stinson v. United States*, 508 U.S. 36, 45 (1993) (emphasis added); *see also, e.g., Talk Am.*, 131 S. Ct. at 2263 (rejecting proposed interpretation of regulation because it "would directly conflict with the statutory language"); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 285-86 (2009) (ensuring that regulation, as interpreted by the agency, was "a sensible and rational construction" of relevant statutory provisions). Otherwise, agencies would be able to flout the directives of Congress by promulgating ambiguous regulations and then interpreting them contrary to statutory commands.

Nothing in *Seminole Rock* holds that this general rule does not apply in this context as well. In that case – as would be the situation here if Section 1369(b) applied to the type of regulations at issue – a separate and exclusive procedure existed for challenging the validity of the agency's regulation. 325 U.S. at 418-19; *see also Lockerty v. Phillips*, 319 U.S. 182, 185-86 (1943). This Court noted, therefore, that it did not have the authority to "reach any question . . . as to the constitutionality or statutory validity of the regulation." *Seminole Rock*, 325 U.S. at 418. But this Court did *not* hold that it lacked the power in this setting to interpret an ambiguity in the regulation to avoid a conflict with the statute. To the contrary, this Court explained – consistent with its later pronouncement in *Duke Energy*, 549 U.S. at 573 – that even within that case's procedural posture, "[t]he intention of Congress or the principles of the

Constitution in some instances may be relevant in the first instance in choosing between various constructions." *Seminole Rock*, 325 U.S. at 414. This Court simply declined to engage in any such statutory avoidance in that case because it found the regulation to be unambiguous. *See id.* at 415-18.

Lest there be any doubt, foreclosing courts in this setting from engaging in statutory avoidance would have perverse consequences. As the Government itself explained to the court of appeals, every time EPA issued regulations covered by Section 1369(b) or a similar statute, parties would be required immediately to "challenge [any] potential regulatory interpretations that are textually plausible" and that they believe would violate the statute. Pet. App. 7a.[8] This would open the floodgates to innumerable "hypothetical" lawsuits – most of them for no good reason because agencies presumably would typically construe ambiguous regulations to comport with statutory limitations. *Id.*

The Government's only response to this problem in its current brief is to suggest that when an agency clarifies its view of an ambiguous rule in an amicus brief, that filing might "provide a new opportunity for review of the rule itself" under Section 1369(b)(1)'s exception for newly arising grounds. U.S. Br. 22 n.8. But this approach – even if compatible with the text

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[8] Other Acts that have provisions similar to Section 1369(b) making certain EPA actions immediately reviewable in courts of appeals include the Clean Air Act, 42 U.S.C. § 7607(b)(1); the Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a)(1); and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276(a)(1).

of the statute – would be utterly unworkable. As an initial matter, it is impossible to hold the general public responsible for knowing what EPA or any other agency says in every amicus brief it files in every court across the country. So the only entities with any realistic opportunity to challenge such agency actions in Section 1369(b) lawsuits would be the litigants in the case in which the agency filed its brief.

Even then, such challenges would raise a number of new complexities that would tangle up litigation for no good reason. A party unhappy with an agency's amicus filing would presumably have to seek a stay in the original case and file a brand new case in the court of appeals. Then the two courts (or perhaps the two panels of the same court) would either proceed simultaneously or would have to decide who goes first. Multiple questions would then arise. Should the court in the enforcement action first decide whether the agency's proposed interpretation is correct and otherwise entitled to deference? Or should the court in the Section 1369(b) case first decide whether the agency's interpretation, if correct, would violate the statute? Meanwhile, what happens with respect to discovery and motion practice in the enforcement action, and how would appeals be handled? None of these quandaries have easy answers.

Thankfully, there is no reason to try to answer them. *Duke Energy* is correct: a court in a civil enforcement action may, as the court of appeals did here, adopt "a purposeful but permissible reading of the regulation . . . to bring it into harmony with [its]

view of the statute." 549 U.S. at 573. And that is all that is required to resolve this case. Pet. App. 5a-7a.

B. Even If Respondent's Statutory Arguments Dictated That Certain Regulations Were Invalid, Section 1369(b) Still Would Not Preclude Relief Because The Pertinent Regulations Did Not Issue Or Deny Any Permit.

Even if respondent's argument that the CWA unambiguously requires permits for the discharges at issue implied that certain regulations were invalid, Section 1369(b) would still not apply here. The text, structure, and purpose of the provision – as well as applicable precedent – demonstrate that it does not apply to the regulations relevant here because those regulations did not issue or deny an NPDES permit.

1. *Text.* Section 1369(b)(1) enumerates seven discrete types of EPA action to which its system of review applies. Those categories are exclusive and hardly encompass – as the State would like – all "EPA[] rules promulgated under the CWA." State Br. 32. As the Second Circuit explained shortly after the Act's passage, the "specificity of section [1369(b)] in identifying what actions of EPA under the [CWA] would be reviewable in the courts of appeals suggests that not all such actions are so reviewable." *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 517 (2d Cir. 1976). "[O]nly those EPA actions specifically enumerated in 33 U.S.C. § 1369(b)(1)" are subject to that statute. *Friends of the Earth v. EPA*, 333 F.3d 184, 193 (D.C. Cir. 2003).

The Industry Petitioners and the United States accept that Section 1369(b) applies only to certain categories of regulations but assert that it applies here because it applies to all "NPDES regulations." U.S. Br. 16; *accord* Industry Br. 51. But the statute contains no such language. Instead, Subsection 1369(b)(1)(F) – the only subsection even conceivably relevant here – covers challenges only to actions "*issuing or denying any permit* under [the NPDES program]." 33 U.S.C. § 1369(b)(1)(F) (emphasis added).

Quite plainly, EPA has neither issued nor denied any NPDES permit respecting the discharges at issue. Petitioners have not even applied for such a permit. At most, according to petitioners, EPA has issued certain regulations sorting out which kinds of discharges require permits and providing that petitioners need *not* seek permits for the discharges at issue. Even assuming for the moment that petitioners' view of the regulations is accurate, such regulations are manifestly not the same as orders issuing or denying permits themselves.

EPA itself has previously recognized as much. Upon providing notice of various regulations governing the NPDES program, EPA explained that under Section 1369(b), "review is not provided for actions in issuing general regulations governing the issuance of NPDES permits." 44 Fed. Reg. 32,855 (June 7, 1979); *see also Am. Iron & Steel Inst. v. EPA*, 543 F.2d 521, 524-25 (3d Cir. 1976) (successfully taking same position). Quoting the text of Subsection 1369(b)(1)(F), EPA explained that the statute covers only the results of "individual permit issuance actions." 44 Fed. Reg. at 32,855. That

construction of the statute is clearly correct, and EPA offers no explanation for its new position here.

2. *Structure.* The CWA's 1987 amendments regulating stormwater discharges confirm that the realm of EPA actions that comprise "issuing or denying any permit" for purposes of Subsection 1369(b)(1)(F) does not include EPA regulations that simply sort out which discharges are covered by the NPDES program. In those amendments, Congress directed EPA to "establish regulations setting forth the permit application requirements" for certain discharges of stormwater by a certain date. 33 U.S.C. § 1342(p)(4)(A). Congress then required "[a]pplications for permits" to be filed one year after that date. *Id.* Finally, Congress directed EPA within one more year of filing to "*issue or deny each such permit.*" *Id.* (emphasis added).

The Stormwater Amendments thus conceive of regulations establishing the parameters of the NPDES permitting regime as quite distinct from agency action actually "issuing or denying" NPDES permits; the latter type of action occurs only after the agency has issued general regulations and persons have applied for permits. And because a "standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning," *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007), the phrase "issuing or denying any permit" in Subsection 1369(b)(1)(F) should likewise

be construed to cover only the processing of permit applications.[9]

3. *Purpose.* It is critical that Subsection 1369(b)(1)(F) remain confined to its proper sphere. *See generally* Amicus Br. of Law Professors on Section 1369(b) Jurisdiction. As several courts of appeals have explained, "[r]eviewability under section 1369 carries a particular sting" – namely, the preclusion of any challenge to EPA action not brought within 120 days. *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). Therefore, "the more [regulations courts] pull within [§ 1369(b)], the more arguments will be knocked out by inadvertence later on – and the more reason firms will have to petition for review of everything in sight." *Id.* (second alteration in original) (quoting *Am. Paper Inst. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989) (Easterbrook, J.)). Such petitions needlessly burden the federal courts.

Worse yet, transforming Subsection 1369(b)(1)(F) into a general catch-all covering any EPA regulation relating to the NPDES program would require the courts of appeals to resolve legal challenges to such regulations "in a vacuum." *Am. Iron & Steel Inst.*,

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[9] Other statutory regimes use the words "issue or deny a permit" to mean the same thing. *See, e.g.*, 33 U.S.C. § 2602(e) ("The Secretary, after consultation with the Administrator, shall issue or deny a vessel permit under this section within 30 days after receiving a complete application."); 42 U.S.C. § 7661b(c) ("The permitting authority shall approve or disapprove a completed application . . . and shall issue or deny the permit, within 18 months after the date of receipt thereof.").

543 F.2d at 528. When EPA, for example, exempts a class of discharges from the NPDES program, a lawsuit filed in a district court may generate a record through adversarial litigation that helps a court assess the validity of EPA's interpretation of the Act. Such litigation concerning the "concrete" "effects" of agency action, as this Court has noted, is far preferable to "abstract disagreements over administrative policies." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

Petitioners' only objection to following this generally preferred method of litigation is that "[c]omplying with EPA rules can entail enormous up-front investments of money, effort, and advance planning." Industry Br. 58 (internal quotation marks and citation omitted). But that is no objection at all in the context of regulations that purportedly exempt discharges from the NPDES permit requirement. In that situation, the regulations do *not* require businesses to take the steps necessary to comply with the NPDES program. Accordingly, even if petitioners' view of the regulations were correct and this Court were allowed to rewrite and expand the reach of Section 1369(b) to enable immediate challenges to this type of EPA action, there would be no policy rationale for doing so.

4. *Precedent.* That leaves only the passing suggestions from petitioners and the United States that this Court's decisions in *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980) (per curiam), and *E.I. Dupont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), construed Section 1369(b) to require immediate challenge to all "NPDES permitting

regulations." U.S. Br. 16 n.7; *accord* Industry Br. 51 n.6. Neither decision, however, did any such thing.

In *Crown*, businesses applied for and received a NPDES permit from a state authorized to issue such permits itself. But EPA then exercised its statutory right to "veto" the permit. 445 U.S. at 193. This Court held that when EPA "objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to 'den[y]' a permit within the meaning of § [1369(b)(1)(F)]." *Id.* at 195-96 (second alteration added). Far from supporting any application of Section 1369(b) here, that holding reinforces that the statute's text means what it says and covers only issuances or denials of permits after dischargers have applied for such permits.

E.I. Dupont is even farther afield from the situation at hand. The central question in that case was whether EPA had authority to enact regulations setting effluent limitations for classes or categories of dischargers. 430 U.S. at 124. That question gave rise to a "subsidiary" jurisdictional issue: if EPA was allowed to issue effluent limitations by regulation, those regulations would be subject to Subsection 1369(b)(1)(E), which applies to agency action "promulgating any effluent limitation." *E.I. Dupont*, 430 U.S. at 124-25. This Court held that EPA may indeed establish categorical effluent limitations by way of regulation, thereby "necessarily resolv[ing] the jurisdictional issue as well." *Id.* at 136. That is the sum and total of *E.I. Dupont*. This Court held that EPA's regulation was subject to review under Subsection 1369(b)(1)(E) because it accomplished the *very* thing listed in that subsection: it promulgated an effluent limitation.

That holding is of no help to petitioners. An "effluent limitation" is "any restriction" on "chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11). EPA obviously has not promulgated any effluent limitation respecting the discharges at issue that respondent's view of the CWA would invalidate.

The Industry Petitioners and the Government nevertheless quote this Court's statement in *E.I. Dupont* that barring immediate review in that case would have produced "the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to § [1342] but would have no power of direct review of the basic regulations governing those individual actions." 430 U.S. at 136. In context, this Court's reference to "basic regulations governing those individual actions" refers to nothing more than regulations setting effluent limitations – the type of agency action at issue in the case and expressly listed in Subsection 1369(b)(1)(E). Nothing in that sentence has anything to do with Subsection 1369(b)(1)(F) or otherwise suggests that Section 1369(b) covers anything beyond the agency actions expressly enumerated by Congress.[10]

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[10] Although the Government also suggests (U.S. Br. 16 n.7) that federal appellate case law supports applying Section 1369(b)(1)(F) here, the Third and Ninth Circuits – in cases the Government ignores – have held that EPA regulations purporting to exempt certain discharges from the NPDES program are not reviewable as "issuances" or "denials" of

In short, Section 1369(b)(1)(F) applies only to the issuance or denials of NPDES permits. Because no relevant regulation here does either of those things, this Court is free – indeed, it is required – to employ its customary tools of statutory interpretation in assessing respondent's substantive claim.

II. The CWA Requires A Permit For Pipes, Ditches, And Channels That Discharge Polluted Stormwater From Active Industrial Logging Roads Into Navigable Waters.

The CWA generally prohibits the discharge of any pollutant from a "point source" into navigable waters without a permit. Pet. App. 9a; *see also* 33 U.S.C. §§ 1311(a), 1342. There is no dispute that the stormwater at issue contains pollutants or that it is being discharged into navigable waters. Nor have petitioners ever sought or obtained a permit. So two crucial questions – dependent, for the reasons described above, on ordinary *Chevron* analysis – remain: (A) whether the pipes, ditches, and channels that discharge the stormwater at issue are point sources; and (B) if so, whether the CWA's Stormwater

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permits. *See Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1015-18 (9th Cir. 2008); *Am. Iron & Steel Inst.*, 543 F.2d at 525-28. The D.C. Circuit also has invalidated such regulations without noting any impediment from Section 1369(b). *See NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The Sixth Circuit's decision in *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6th Cir. 2009), holding that Section 1369(b) applies in this context, is simply incorrect.

Amendments exempt these point sources from the Act's permitting system.

The CWA and, to the extent relevant, its implementing regulations make clear that the conveyances at issue here are "point sources," and that they are not exempt from the NPDES program.

A. The Discharges At Issue Are From "Point Sources."

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (internal quotation marks and citations omitted). Accordingly, respondent begins by showing that the CWA itself plainly deems the conveyances at issue here to be point sources. Respondent then shows that EPA's regulations, to the extent relevant, are – or, at the very least, can and thus must be construed to be – consistent with that result.

1. The Statute

The text, structure, and legislative history of the CWA dictate that the NPDES permit requirement applies to pipes, ditches, and channels that collect stormwater from logging roads and discharge it into navigable waters.

a. *Text.* The text of the CWA's definition of "point source" could hardly be more straightforward as applied to this case. That text defines the term as "any discernible, confined and discrete conveyance, including but not limited to *any pipe, ditch, channel,*

tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). The word "any" means all – "one or some indiscriminately of whatever kind." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Thus, because the conveyances at issue here are pipes, ditches, and channels, 2JA 17-18 – the very things mentioned in the statutory definition – they are plainly "point sources."

The Industry Petitioners and the United States nonetheless assert that "Congress expected EPA to exercise judgment in defining point source and nonpoint source pollution." Industry Br. 21; *see also* U.S. Br. 3. In particular, they contend that it requires interpretation and judgment to determine whether a conveyance is "discrete." Industry Br. 21-22; *see also* U.S. Br. 21. But these contentions miss the point. The generic requirements for covered conveyances – including that they be "discrete" – may be relevant in determining whether a conveyance not named in the statutory definition constitutes a point source. *See, e.g., Ass'n to Protect Hammersly, Eld, & Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1018-19 (9th Cir. 2002) (considering whether "mussel rafts" are point sources). But those requirements are immaterial as applied to conveyances, such as those at issue here, that are expressly listed in the statute.

An example illustrates the point. Imagine that a statute required certain people to obtain a permit before owning "any deadly weapon, including but not

limited to a firearm, knife, or crossbow." The word "deadly" might be ambiguous as applied to some objects or devices. But there would be no doubt that the statute's permitting requirement applied to all firearms, knives, and crossbows. So too here with respect to pipes, ditches, and channels.

The Industry Petitioners, but not the United States, also suggest that Sections 1314(f) and 1288(b)(2)(F) of the Act – which provide guidance for dealing with "silvicultural nonpoint sources" – indicate that the conveyances at issue here might constitute nonpoint sources. Industry Br. 22-23. But all those provisions show is that silvicultural activities can *sometimes* give rise to "nonpoint" pollution. And as the Ninth Circuit itself expressly noted, when stormwater is allowed to run off logging roads without being channeled (as happens, for example, with "outsloped" roads, *see* 2JA 99), it is not necessarily discharged from a point source. Pet. App. 11a. The same is true when such stormwater is channeled but released into low-lying areas of the forest floor, where it is allowed to percolate into the soil, instead of discharged into navigable waters. C.A. ER 54 at 107.

On the other hand, when such water "is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances," it is inescapably "a point source discharge[]." Pet. App. 11a; *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 106 (2004) (Section 1314(f) does not exempt discharges "if they *also* fall within the 'point source' definition."); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980)

(same). Nothing in Sections 1314(f) or 1288(b)(2)(F) suggests anything remotely to the contrary.

2. *Structure.* Two aspects of the CWA's structure reinforce that pipes, ditches, and channels that discharge polluted stormwater from logging roads into navigable waters are point sources.

First, another of the CWA's permitting regimes – one that requires permits for discharges of dredged or fill material – expressly exempts material from "forest roads" and "silviculture," including "harvesting for the production of . . . forest products." 33 U.S.C. § 1344(f)(1)(A), (E). Thus, when Congress wants to exempt the effects of such activity from one of the Act's permitting programs, "it knows how to do so," *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003).

Second, the CWA contains an explicit exemption from its otherwise absolute definition of "point source" in Section 1362(14). The final sentence of that section provides: "This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). The existence of that exemption precludes judicially creating another, for "[w]here Congress explicitly enumerates certain exceptions" to the general functioning of a statute, "additional exceptions are not to be implied." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *accord TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

Advancing an argument that EPA has never made and that the Government does not now support, the Industry Petitioners suggest that they might qualify for the agricultural exemption because

"silviculture is a kind of agriculture." Industry Br. 24. This is wishful thinking. The CWA repeatedly uses the word "silvicultural" to refer to something distinct from "agricultural." *See, e.g.*, 33 U.S.C. § 1288(b)(2)(F) (referencing "agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture"); *id.* § 1314(f)(A) ("agricultural and silvicultural activities"). Given that the statute sometimes refers only to "agricultural" activities and other times refers to "agricultural and silvicultural activities," this Court should presume that Congress "act[ed] intentionally and purposely in the disparate inclusion or exclusion" of the word "silvicultural," *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

3. *Legislative History.* There is no need to consult the legislative history here, for "when the text of the statute is unambiguous," "reference to legislative history is inappropriate." *HUD v. Rucker*, 535 U.S. 125, 132 (2002). At any rate, the legislative history of the CWA only underscores that pipes, ditches, and channels discharging polluted stormwater from logging roads into navigable waters are point sources. As the D.C. Circuit remarked when rebuffing EPA's attempt categorically to exempt silvicultural activities from the definition of "point source," legislators "stressed that the [CWA] was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type." *NRDC v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977). For example, Senator Jennings Randolph, Chairman of the Senate committee responsible for the Act, explained:

> I stress very strongly that Congress has become very specific on the steps it wants taken with regard to environmental protection. We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives for administrators to follow.

117 Cong. Rec. 38,805 (1971). The Act's broad yet specific definition of "point source" is emblematic of that "precise" and "definite" approach.

The Industry Petitioners nonetheless insist that "Congress expected EPA to further flesh out which discharges fall into the point and nonpoint source categories." Industry Br. 5. Noting that Senator Edmund Muskie was "the 'leading Congressional sponsor' of the Act," *id.* 5 (quoting *Costle*, 568 F.2d at 1374), they twice quote his remark that "'[g]uidance with respect to the identification of "point sources" and "nonpoint sources"' will 'be provided in regulations and guidelines of the Administrator,'" *id.* 5 (alteration in original) (quoting 117 Cong. Rec. 38,816 (1971)); *see also id.* 25 n.2. But both times, the Industry Petitioners omit what Senator Muskie said in the very next breath: "If a man-made drainage, ditch, flushing system or other such device is involved and if measurable waste results and is discharged into water, it is considered a 'point source.'" 117 Cong. Rec. 38,816 (1971). In other words, Congress recognized that EPA would resolve issues around the edges of the definition of "point source," but it insisted in no uncertain terms that the term cover all pipes, ditches, and channels.

On at least one occasion, the timber industry has recognized as much. In 1977, Continental Forest Products wrote a letter to Congress noting that logging roads sometimes use "ditches" and "culverts" for "drainage of the road surface." FWCPA Amendments of 1977, Subcomm. on Envtl. Pollution of the Comm. on the Env't and Pub. Works, Part 10 (1977) Part A at 331032. The company asked legislators to exempt such conveyances from the NPDES permitting system, asserting that "[t]o require a permit for each road, bridge, and culvert we build and maintain on our own lands would be burdensome, costly, and wasteful." *Id.* Soon thereafter, Senator Goldwater proposed amending the Act to create broad exemptions for "agriculturally *and silviculturally* related percolations, seepages, drainages, or discharges, occurring naturally or artificially induced." FWCPA Amendments of 1977, Subcomm. on Envtl. Pollution of the Comm. on the Env't and Pub. Works (June 21-23, 1977) (emphasis added).

Although Congress – as noted above – enacted a modified version of this exemption with respect to agricultural activities, it never acted on Senator Goldwater's proposal to include "silvicultural[]" activities in this exemption. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation marks omitted); *see also Russello*, 464 U.S. at 23-24 (deletion of language in earlier

version of bill presumed intentional). This presumption is conclusive here.

2. The Silvicultural Rule

Given the clarity of the statute, there is no need to consult EPA's point source regulations. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). But those regulations also plainly denote pipes, ditches, and channels draining logging roads as point sources – or, at the very least, they are ambiguous and must be so construed under *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 573 (2007), in order to save them from invalidity.

a. An EPA regulation acknowledges that "surface runoff [containing pollutants] which is collected or channelled by man" constitutes a "point source" discharge. 40 C.F.R. § 122.2 (defining "discharge of a pollutant"). Another regulation, the Silvicultural Rule, provides that the regulatory term "[s]ilvicultural point source" means "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged." 40 C.F.R. § 122.27(b)(1). The Silvicultural Rule adds that the term "[s]ilvicultural point source" excludes "*non-point source* silvicultural activities such as . . . harvesting operations, surface drainage, or road construction and maintenance from which there is *natural runoff*." *Id.* (emphasis added).

Just like any statute, these regulations must, if possible, be construed to be a harmonious whole. *See, e.g., Fishgold v. Sullivan Drydock & Repair*

Corp., 328 U.S. 275, 285 (1946). The way to accomplish that is to recognize that stormwater from logging roads is a point source when it is "collected or channelled by man" 40 C.F.R. § 122.2 – that is, by man-made pipes, ditches, channels, or other discrete conveyances – and discharged into navigable waters. It is a nonpoint source when it otherwise drains or runs off of logging roads. Indeed, no other construction of the regulations is linguistically possible. Instead of excluding *all* discharges related to harvesting operations, surface drainage, and road construction and maintenance, the Silvicultural Rule excludes only "*non-point* source" runoff. *Id.* § 122.27(b) (emphasis added). Nonpoint source pollution is runoff that is not channeled in man-made conveyances at all.

It is also telling that the sentence in the Silvicultural Rule in which the reference to nonpoint sources appears refers only to "natural runoff." EPA added that term in 1980, following the D.C. Circuit's holding in *Costle* that EPA lacks the authority to exempt any silvicultural point sources from the NPDES permitting system, *see* 568 F.2d at 1382. The word "natural" means "in a state provided by nature, *without man-made changes.*" Webster's New World Dictionary 903 (3d ed. 1988) (emphasis added). Accordingly, once stormwater picks up debris generated by human activity and is channeled from logging roads through man-made pipes, ditches, and channels, it is no longer "natural runoff." *N.C.*

Shellfish Growers Ass'n v. Holly Ridge Assocs., 278 F. Supp. 2d 654, 681 (E.D.N.C. 2003).[11]

b. The Industry Petitioners assert that this analysis "renders meaningless the rule's reference to runoff from 'road construction and maintenance'" as nonpoint source activities. Industry Br. 34. This is incorrect. Road construction and maintenance are different activities than timber hauling. At any rate, road construction and maintenance will sometimes be done without the use of pipes, ditches, and channels. Some logging roads drain stormwater by way of outsloping instead of such conveyance systems. And even as to logging roads with such conveyance systems, those roads and systems – as the Industry Petitioners themselves remind this Court – have to be "built." Industry Br. 34. Until they are built and completed (or while they are being repaired and are inoperable), they do not exist and thus cannot be point sources.

Petitioners also attempt to plug the holes in their textual argument respecting the Silvicultural Rule by quoting various EPA statements from the Federal Register. *Id.* 19, 30-31; State Br. 7-8, 23-24. Some of these statements indicate that when runoff from logging roads "collect[s]" and is channeled through "ditches, pipes, and drains," these ditches, pipes, and drains are not point sources. Industry Br. 19, 31 (quoting 40 Fed. Reg. 56,932 (Dec. 5, 1975) and 41 Fed. Reg. 6282 (Feb. 12, 1976)).

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[11] One of petitioners' amici recognizes as much, contrasting "channeled" runoff from that which "flows naturally." Amicus Br. of Nat'l Governors Ass'n 7.

Even assuming that when EPA made those statements it had in mind conveyances that discharge stormwater into navigable water instead of the forest floor, those statements do not aid petitioners because EPA made them in 1975 and 1976 – *before* two important and related occurrences: (1) the D.C. Circuit's decision in 1977 that EPA lacked the authority to exempt point sources related to logging from the NPDES permitting system, *Costle*, 568 F.2d at 1382; and (2) EPA's amendment to the Silvicultural Rule in 1980 to replace the phrase "from which runoff results from precipitation events," 40 C.F.R. § 124.85 (1976), with "from which there is natural runoff," 40 C.F.R. § 122.27(b)(1). Consequently, as the United States acknowledges, EPA's pre-amendment views do not "resolve th[e] specific issue" here. U.S. Br. 30 n.12; *see also id.* 19 (stating that amended Silvicultural Rule's reference to "natural runoff" does not "clearly encompass[] . . . the sort of channeled runoff that is at issue in this case").

Nor *could* those views resolve the issue, since this Court does not consult the Federal Register to determine the *meaning* of regulations. Instead, the most agency statements in that publication can do is show whether an agency's interpretation of a regulation has remained consistent over time and thus is eligible for deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *See, e.g., Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011). Here, there are so many reasons why EPA's proposed interpretation of the Silvicultural Rule is illegitimate

that its decades-ago statements in the Federal Register cannot even accomplish that.[12]

B. The CWA's Stormwater Amendments Do Not Exempt Point Source Discharges Of Stormwater From Active-Hauling Logging Roads From The NPDES Permit Requirement.

In the 1987 Stormwater Amendments to the CWA, Congress gave EPA discretion whether to require permits for certain discharges of stormwater from "relatively de minimus [point] sources" – things such as rain gutters and similar devices at "churches, schools and residential properties." Pet. App. 37a.[13] At the same time, Congress insisted that point source discharges "associated with industrial activity" continue to be subject to the NPDES permit requirement. 33 U.S.C. § 1342(p)(2)(B), (3)(A). Contrary to petitioners' and the United States' arguments, discharges from point sources along active-hauling logging roads are "associated with industrial activity" under the plain meaning of that

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[12] If necessary, this Court should also "reconsider *Auer* in the present case," *Talk Am.*, 131 S. Ct. at 2266 (Scalia, J., concurring), and hold that it is improper to defer under these circumstances to EPA's interpretations of the Silvicultural Rule or the Phase I regulations. *See also* Amicus Br. of Law Professors on the Propriety of Administrative Deference.

[13] Congress did not, however, altogether exempt such point sources from regulation. Unlike nonpoint sources, point source discharges of stormwater that are not now subject to the NPDES program are subject to studies conducted by EPA for possible future inclusion in the NPDES system. *See* 33 U.S.C. § 1342(p)(5)-(6).

statutory phrase and, to the extent relevant, its implementing regulations.

1. The Statute

Neither petitioners nor the United States make any effort to ascribe meaning to the CWA's term "industrial activity." Perhaps that is because performing that fundamental task exposes how incompatible their positions are with the statutory text.

When, as here, a statute does not define words, this Court "give[s] them their ordinary meaning." *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). The ordinary meaning of "industrial" is "of, connected with, or resulting from industries." Webster's New World Dictionary, *supra*, at 689. The dictionary defines "industry," in turn, as "any particular branch of productive, esp. manufacturing, enterprise" or "any large-scale business activity." *Id.* at 690.

Plainly, this definition encompasses the sort of mechanized timber cutting and hauling operations that petitioners use logging roads to conduct. As elaborated above, such operations involve assemblages of multi-ton machinery (which operate with powerful internal combustion engines) felling and dragging trees. *See supra* at 4-5 (describing this process and including links to videos and photos). Other heavy equipment strips the trees of their branches and loads them onto massive logging trucks. *Id.* Those fully loaded trucks then haul away the companies' raw material to be milled or shipped elsewhere. *Id.* This work occurs on massive scales;

timber contracts typically contemplate harvesting several hundreds of acres of land at a time.

In fact, when petitioners are in non-litigation mode, they openly embrace their work as industrial. Georgia-Pacific's website explains that it operates within the "forest products industry"[14]; the American Forest & Paper Association has a website called "our industry"[15]; and the very name of the Oregon Forest *Industries* Council tells this Court all it needs to know.

It is immaterial that the work that occurs on logging roads is "in the field," so to speak, as opposed to at a mill or factory. As EPA itself has recognized, the word "industrial" covers various field work, such as mining and construction activities, as well as landfill operations. 40 C.F.R. § 122.26(b)(14)(iii), (v), (x); *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 307 (1981) (Powell, J., concurring) (surface mining is "a major industrial activity"). The import of the word – as legislators themselves indicated – is to distinguish large-scale business activity from "churches, schools, [and] residential property," 131 Cong. Rec. 19,850 (1985) (Rep. Rowland), not land-based operations from those occurring inside factories. And the logging operations at issue here are obviously large-scale, mechanized business activity.

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[14] Georgia-Pacific, Careers, http://www.gp.com/careers/company/index.html (last visited Oct. 12, 2012).

[15] Am. Forest & Paper Ass'n, Our Industry – Forestry, http://tinyurl.com/NEDC3-7 (last visited Oct. 12, 2012).

2. Phase I Regulations

As with the CWA's definition of "point source," there is no need, given the clarity of the statute, to consult EPA's regulations implementing the Stormwater Amendments. *See Chevron*, 467 U.S. at 842-43. But those regulations equally plainly require permits for discharges from pipes, ditches, and channels that collect stormwater from active-hauling logging roads and discharge it into navigable waters. At the very least, the regulations are ambiguous and EPA's contrary suggestions are not entitled to deference. *See Christopher*, 132 S. Ct. at 2166; *Talk Am.*, 131 S. Ct. at 2266 (Scalia J., concurring); *Duke Energy*, 549 U.S. at 573.

a. EPA's regulations plainly classify the discharges here as "associated with industrial activity." Those regulations provide that "[f]acilities classified as Standard Industrial Classification[] [SIC] 24" "are considered to be engaging in 'industrial activity.'" 40 C.F.R. § 122.26(b)(14) & (b)(14)(ii). SIC 24, in turn, includes "logging," defined as a class of "[e]stablishments primarily engaged in cutting timber and in producing . . . primary forest or wood raw materials." 2JA 64 (quoting "Industry number 2411"); *see also* 2JA 53; 2JA 50 (EPA Report: "[i]ndustrial activities include . . . loading and unloading of logs onto trucks or railroad cars for transport"). And for any "categor[y] of industry identified in [EPA's regulations]," the phrase "*associated with* industrial activity" encompasses sites used for "loading and unloading, transportation, or conveyance of any raw material." 40 C.F.R. § 122.26(b)(14) (emphasis added). That describes active-hauling logging roads exactly.

b. The Government disputes this analysis on the ground that SIC 2411 uses the word "establishments" to describe the things it covers. U.S. Br. 25. But that nomenclature is of no moment. SIC 24 uses that term throughout its classifications simply to mean "industries" or "businesses." 2JA 64-69. What is more, EPA itself recognizes elsewhere that other activity in open space, such as mining, construction, and landfills, is industrial. *See* 40 C.F.R. § 122.26(b)(14)(iii) (mining); 73 Fed. Reg. 56,572 (Sept. 29, 2008) (mining); 40 C.F.R. § 122.26(b)(14)(x) (construction); *id.* § (14)(v) (landfills). The Government offers no reason why logging activity would uniquely have to occur inside a factory or mill to be industrial.

The only other argument that the Government advances in urging this Court to disregard the plain import of EPA's regulations is that, in referencing SIC 2411, "EPA *intended* to reference only . . . rock crushing, gravel washing, log sorting, and log storage." U.S. Br. 25 (emphasis added) (internal quotation marks omitted). Even taking the Government's assertion of intent at face value, *but see Talk Am.*, 131 S. Ct. at 2266 (Scalia J., concurring), it is improper for this Court to "[go] behind the plain language" of a regulation "in search of a possibly contrary . . . intent." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982). When an agency's interpretation is "inconsistent with the regulation" as written, it is not eligible for deference. *Auer*, 519 U.S. at 461 (internal quotation marks omitted). And here, the regulations expressly classify SIC 24 as "industrial activity"; SIC 24 includes "logging"; and "logging" includes "cutting timber" and producing

"wood raw materials." That is unambiguously the end of the matter.

c. Perhaps sensing the weakness of EPA's position, petitioners offer no fewer than four other arguments for avoiding the straightforward meaning of the stormwater regulations. But none of these industry arguments is eligible for deference because none comes from EPA. *See Auer*, 519 U.S. at 461. At any rate, each argument conflicts with the plain language of the Phase I rule's categorization of logging as industrial activity.

First, the Industry Petitioners contend that logging does not fall within EPA's general definition of "industrial activity." Industry Br. 38. That definition describes industrial activity as "manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). But this general definition does not override the regulation's specific statement that facilities classified under SIC 24 "are considered to be engaging in 'industrial activity,'" 40 C.F.R. § 122.26(b)(14). *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (specific provisions govern more general ones). At any rate, the general definition encompasses "manufacturing," and the federal government categorizes "logging" as a "manufacturing" business. 2JA 53 & 64.

If petitioners mean to suggest that the phrase "at an industrial plant" limits the scope of manufacturing activities that EPA's general definition covers, then petitioners are ignoring the "commonsense principle of grammar" known as the last-antecedent rule. Antonin Scalia & Bryan A. Garner, Reading Law 144 (2012); *see also Barnhart*

v. Thomas, 540 U.S. 20, 27-28 (2003). The phrase "at an industrial plant" refers only to "raw materials storage," not to "manufacturing or processing." Otherwise, EPA's own inclusion of construction and mining activities in the field, as well as landfills and open dumps, *see* 40 C.F.R. § 122.26(b)(14)(iii), (v), (x), would make no sense.

Second, noting that the Phase I rule states that "*facilities* classified as SIC 24" are engaging in industrial activity, the Industry Petitioners argue that logging sites are not "facilities" because they are not – in the words of a dictionary definition of the term – "built" or "constructed" or "installed." Industry Br. 39 (emphasis added) (quoting 40 C.F.R. § 122.26(b)(14)). This is a curious claim; "logging roads" and their stormwater drainage systems – like other transportation and utility devices – are, in fact, built, constructed, and installed. *Cf.* 23 U.S.C. § 166 (calling HOV lanes on highways "facilities"); 33 U.S.C. § 1362(24) (oil and gas "facilities" include "field activities"); 28 C.F.R. § 36.104 (deeming "roads" to be "facilities" under the Americans with Disabilities Act); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 283 (1958) (calling power lines "facilities"); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 392, 410-11 (1912) (describing railroad bridges and switching yards as "facilities").

At any rate, dictionary definitions are immaterial when the law itself defines a term. *See, e.g.*, *Fox v. Standard Oil Co.*, 294 U.S. 87, 95 (1935). And here, EPA's regulations define "facility" as "any NPDES 'point source' or any other . . . activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program." 40

C.F.R. § 122.2; *see also id.* § 122.26(b)(14)(iii) (using the word "[f]acilities" to describe mining sites). For the reasons described above, logging roads qualify as facilities because pipes, ditches, and channels are point sources that are subject to regulation under the NPDES program. *See supra* at 31-42.

Third, the Industry Petitioners contend that logging roads are not associated with industrial activity because "they are not 'immediate access roads' within the meaning of [40 C.F.R. § 122.26(b)(14)]." Industry Br. 40. The Industry Petitioners are mistaken on multiple levels. As an initial matter, the relevant sentence in that regulation reads: "For the categories of industries identified in this section, the term *includes, but is not limited to*, . . . immediate access roads" and other facilities. 40 C.F.R. § 122.26(b)(14) (emphasis added). In other words, the facilities mentioned in the latter part of the sentence do not constitute an "exhaustive" list of industrial sites. Scalia & Garner, *supra*, at 132 (citing cases). It is thus irrelevant whether the logging roads here qualify as "immediate access roads."

In any event, the roads here *are* immediate access roads. The preamble to EPA's Phase I regulations notes that "immediate access roads" means "roads which are exclusively or primarily dedicated for use by the industrial facility." 55 Fed. Reg. 48,009 (Nov. 16, 1990). The Industry Petitioners contend that logging roads are not used "primarily" for logging because they are also used for "recreational" and other purposes. Industry Br. 41. But as the Ninth Circuit observed, "[l]ogging is [] the

roads' *sine qua non:* If there were no logging, there would be no logging roads." Pet. App. 40a.

Even if some logging roads could be characterized as used primarily for recreational activity, petitioners and the Government ignore the fact that this case involves only certain specified logging roads that are the sole designated access and haul routes for active logging operations. C.A. ER 47 at 98-99. These roads are located in a forest managed year-round for timber production and are essential for the mechanized timber cutting, loading, and hauling that is taking place there. Indeed, petitioners themselves are obligated by contract to use and maintain these roads for those precise purposes. 2JA 7-8, 19-20; C.A. ER 47 at 98-99. Surely the primary use of at least *these* roads is logging.

Fourth, petitioners assert that the Phase I regulations exclude logging because they provide that they do not apply to "facilities or activities excluded from the NPDES program under [the Silvicultural Rule]." Industry Br. 38 (quoting 40 C.F.R. § 122.26(b)(14)); *see also id.* 40. Because the Silvicultural Rule itself does not exclude the discharges at issue here from the NPDES program, *see supra* at 38-42, this reference to it cannot do so either.

C. None Of Petitioners' Policy Arguments Warrants Disregarding The CWA's Permitting System In This Context.

The plain import of the statutory provisions here makes perfect sense in light of the CWA's overall purpose and operation. That purpose – as Congress enshrined in the statute itself – is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "[T]he word 'integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (quoting H.R. Rep. No. 92-911, at 76 (1972)). Accordingly, the Act targets a wide range of "preventable causes of water pollution" – namely, identifiable point sources. *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). Among other things, the Act requires permits for channeled discharges from mining and construction sites, as well as for sewer systems that drain stormwater from municipal roads and state highway systems. 33 U.S.C. § 1342(p)(3); 40 C.F.R. §§ 122.26(b)(14)(iii) (mining), 122.26(a)(3)(i) (municipal sewers), 122.26(b)(14)(x) (construction), 122.28(a)(1)(iv) (state highways).

Regulating channeled discharges from active-hauling logging roads is an essential component of this regime. Such discharges are a leading source of water quality impairment to rivers and streams nationwide. 2JA 15 (citing Environmental Protection Agency, *2000 National Water Quality Inventory* 14 (Figure 2-5)). The sediment that logging roads deliver not only changes the structure of riverbeds

and the temperature of streams, but also "adversely affects fish – in particular, salmon and trout – by smothering eggs, reducing oxygen levels, interfering with feeding, and burying insects that provide food." Pet. App. 4a; *see also* Amicus Br. of W. Div. of the Am. Fisheries Soc'y. There is consequently every reason to bring such discharges – when they are channeled by man and thus can be pinpointed – within the purview of the NPDES permitting system, instead of merely leaving them to states' "best management practices." *See generally* Amicus Br. of Northwest Environmental Advocates (detailing shortcomings in states' nonpoint source programs).

Petitioners nevertheless object that subjecting the discharges at issue here to the NPDES permitting system would be costly and unnecessary. Industry Br. 43-50; State Br. 23-27. They also contend that subjecting these discharges to federal permitting requirements would upend years of settled practice of complying only with state regulations. Industry Br. 43-50; State Br. 23-27. Neither of these objections warrants deviating from Congress's clear statutory design.

1. The burden petitioners claim they would encounter by complying with the NPDES permitting system provides no reason for this Court to create a judicial exemption to that system.

a. Compliance with environmental laws can be nettlesome and sometimes expensive. But this Court has explained time and again that "[w]hether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed

judges," nor by federal agencies "in contradiction of congressional direction." *Rapanos v. United States*, 547 U.S. 715, 752-53 (2006) (plurality opinion) (internal quotation marks and citation omitted); *see also Massachusetts v. EPA*, 549 U.S. 497, 529-30 (2007) (even though EPA asserted that regulating carbon dioxide emissions would be burdensome, the Clean Air Act required it to do so because it required regulation of "any" air pollutant, and the definition of "pollutant" embraced carbon dioxide); *TVA v. Hill*, 437 U.S. 153, 184, 188 (1978) (rejecting argument that enforcing the Endangered Species Act according to its "plain intent" would be too costly; this Court "emphatically" lacks "the power to engage in such a [cost/benefit] weighing process").[16] If petitioners wish to argue that it is unnecessarily costly and difficult for them to obtain NPDES permits, they should make those arguments to Congress, not to this Court.

b. In any event, petitioners' suggestions of doom are, to say the least, overblown.

i. At the outset, it is important to reiterate that the vast majority of logging roads do not generate

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[16] Of course, this Court has made essentially the same point with respect to statutory interpretation more generally. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("[This Court] possess[es] neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them."); *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66, 76-77 (1999) (refusing to consider defendant's "concerns about the financial burden" that federal statute imposed because the Court's role is simply "to interpret existing law").

point source discharges. Some logging roads are "outsloped" instead of crowned, allowing stormwater to drain downhill without collecting in any man-made channels. 2JA 99. And even when logging roads are crowned and have stormwater collection and channeling systems, most such systems disperse the stormwater they collect onto the forest floor, where it can percolate into the ground and leave suspended sediments behind. 2JA 15; C.A. ER 54 at 107. In the areas at issue here, only about 25% of the stormwater from logging roads is collected and discharged by man-made conveyances into navigable waters. 2JA 15. Furthermore, only a fraction of those roads are host to active timber cutting and hauling at any given time.

ii. As to *those* portions of *those* roads, the D.C. Circuit has correctly noted that "[t]he existence of a variety of options" for regulating silvicultural point sources "belies EPA's infeasibility arguments." *Costle*, 568 F.2d at 1381. Three options bear mentioning.

First, permitting authorities can issue permits covering entire regimes, including expansive road networks. Noting that "[a]rea-wide regulation is one well-established means of coping with administrative exigency," the D.C. Circuit explained that the CWA allows a permitting authority to issue a "general" permit "to a *class* of point source dischargers, subject to notice and opportunity for public hearing in the geographical area covered by the permit." *Id.* at 1381 (emphasis added); *see also* 40 C.F.R. §§ 122.28, 123.25. This procedure not only eases administrative strain, but also allows states and their political subdivisions to tailor permit requirements to regional

conditions. For instance, EPA has issued a general permit covering *all* small-scale construction sites within its jurisdiction across the country. *See* Final [NPDES] General Permit for Stormwater Discharges from Construction Activities, 77 Fed. Reg. 12,286 (Feb. 29, 2012). Similarly, the Oregon Department of Environmental Quality has issued a single permit to the Oregon Department of Transportation that covers every point source that drains stormwater on the state highway system.[17] There is no reason why a similar approach could not be used here. *See* Amicus Br. of Robert Wayland and Other Former Senior State and Federal EPA Officials; Amicus Br. of Environmental Protection Information Ctr.

Second, EPA can impose "alternative permit conditions" other than the CWA's default of complying with prescribed effluent limitations. *Costle*, 568 F.2d at 1379-80. Under Section 1342(a), EPA (or its state delegates) may issue permits contingent upon (A) compliance with established effluent limitations *or* (B) "such conditions as the Administrator determines are necessary to carry out the provisions of this chapter." 33 U.S.C. § 1342(a). The latter subsection "gives EPA considerable flexibility in framing the permit to achieve the desired reduction in pollutant discharges." *Costle*, 568 F.2d at 1380. Indeed, "[i]t may be appropriate in certain circumstances for EPA to require a permittee simply to monitor and report effluent levels; EPA

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[17] *See* Stormwater Outfall Inventory Management, Or. Dep't of Transp., http://tinyurl.com/NEDC4-6 (last visited Oct. 12, 2012) (discussing this permit).

manifestly has this authority." *Id.* (footnote and citation omitted).

Third, the CWA allows variances for economic hardship. In particular, permitting authorities need not require owners or operators of point sources to satisfy prescribed effluent levels if the owners/operators show that they will use "the maximum use of technology within the[ir] economic capability" and that their actions "will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C. § 1311(c); *see also Costle*, 568 F.2d at 1379. Thus, while "the Act insist[s] that a permit is necessary" for point sources along logging roads that discharge pollutants into navigable waters, permitting authorities have "necessary flexibility in the shaping of permits that is not inconsistent with the clear terms of the Act." *Costle*, 568 F.2d at 1382.

2. Little need be said respecting petitioners' suggestions that they have some sort of vested interest in their failures thus far to obtain NPDES permits. This Court has rejected such arguments before. In *Rapanos*, the Army Corps of Engineers urged this Court to consider the fact that it had regulated wetlands in a certain manner for thirty years. This Court dismissed the suggestion out of hand: "Surely this is a novel principle of administrative law – a sort of 30-year adverse possession that insulates disregard of statutory text from judicial review. It deservedly has no precedent in our jurisprudence." 547 U.S. at 752 (plurality opinion). Similarly, a municipality recently maintained that losing a case would require governmental and corporate employers to revisit

"practices they have used regularly for years." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010). This Court unanimously brushed aside this assertion, explaining that "it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted. . . . If that effect was unintended, it is a problem for Congress, not one that federal courts can fix." *Id.*

The CWA, in short, "is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all." *Costle*, 568 F.2d at 1380; *see also* Pet. App. 43a-45a. It affords regulators and companies considerable flexibility, but it does not allow them to ignore point sources that pollute our nation's waterways. This Court should enforce the law as written and allow policymakers, if they so choose, to react accordingly.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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